**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| **In the Matter of** | ) | |
| | ) | |
| **Implementation of Section 224 of the Act** | ) | **WC Docket No. 07-245** |
| | ) | |
| **A National Broadband Plan For Our Future** | ) | **GN Docket No. 09-51** |

## COMMENTS OF THE AMERICAN PUBLIC POWER ASSOCIATION ON PETITIONS FOR RECONSIDERATION

The American Public Power Association ("APPA"), on behalf of the Nation's publicly-owned electric utilities, respectfully submits these comments on the petitions for reconsideration of the *Order* adopted by the Federal Communications Commission in the above-captioned proceeding.[1] Specifically, APPA supports the petition for reconsideration filed by the Coalition of Concerned Utilities seeking to have the Commission either reconsider or clarify its rules with respect to the conditions under which utilities are required to allow the use of bracketing, boxing or other pole attachment techniques. As discussed below, the proposed clarification will better reflect the actual practices of utilities, ensure safe pole use, and avoid or minimize disputes.

APPA also submits these comments in opposition to the petition for reconsideration filed by the State Cable Television Associations ("Cable Associations"), which asks the Commission to require electric utility pole owners to replace existing poles with larger poles when the existing poles do not have sufficient capacity to accommodate proposed attachments. As the Commission correctly recognized in *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002), the

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[1] *In the Matter of Implementation of Section 224 of the Act, Order,* WC Docket No. 07-245, released May 20, 2010.

United States Court of Appeals for the Eleventh Circuit struck down such a requirement as being inconsistent with the statutory language of 47 U.S.C. Section 224(f)(2).

## I. INTEREST OF APPA

APPA is a national service organization that represents the interests of more than 2,000 publicly owned, not-for-profit electric utilities located in all states except Hawaii. Many of these utilities were developed in communities left unserved as private-sector electric companies pursued more lucrative opportunities in larger population centers. Residents of these communities banded together to create their own power systems, recognizing that electrification was critical to their economic development, educational opportunities, and quality of life. Public power systems also emerged in several large cities – including Austin, Jacksonville, Los Angeles, Memphis, Nashville, San Antonio, Seattle and Tacoma – where residents believed that competition was necessary to obtain lower prices, higher quality of service, or both. Currently, over 70 percent of APPA's members serve communities with less than 10,000 residents, and approximately 45 million Americans receive their electricity from public power systems operated by municipalities, counties, authorities, states, or public utility districts. APPA provided detailed comments and reply comments on the Commission's proposals in the pending *Notice of Proposed Rulemaking* in this proceeding.

## II. THE COMMISSION SHOULD CLARIFY THE RULES REGARDING BOXING AND BRACKETS AS PROPOSED BY THE COALITION OF CPNCERNED UTILITIES

In its *Order* of May 20, 2010, the Commission concluded that "the nondiscriminatory access obligation established by section 224(f)(1) of the Act requires a utility to allow cable operators and telecommunications carriers to use the same pole attachment techniques that the utility itself uses."[2] The FCC therefore adopted a rule that "any attachment technique that a

[2] *Order,* at ¶ 8.

utility uses or allows to be used will henceforth be presumed appropriate for use by attachers on that utility's poles under comparable circumstances."[3] The Commission indicated that "if a utility chooses to allow boxing and bracketing in some circumstances but not others, the limiting circumstances must be clear, objective, and applied equally to the utility and attaching entity."[4]

In its petition for reconsideration, the Coalition of Concerned Utilities requests that the Commission clarify the rules it has adopted with respect to boxing, bracketing or other techniques that make additional space available on poles. The Coalition urges the Commission to make clear that the nondiscrimination requirement applies only to the extent the pole owner has itself used, or allowed others to use, boxing, bracketing and other attachment techniques for *communications* wires in the communications space.[5] APPA supports this clarification as striking the proper balance between the need of attaching entities to access poles in a nondiscriminatory manner and the ability of utilities to manage the safety and operational integrity of their own poles.

APPA agrees with the Coalition that the Commission should clarify that an electric utility's use of boxing, brackets or any other attachment technique for placing electric facilities in the electric space on their poles does not obligate the utility pole owner to allow the same attachment technique to be used for communications attachments. As an initial matter, the use of boxing bracketing and other attachment techniques in the electric space for electric attachments is not "comparable" to the use of such techniques to place communications attachments in the communications space. One of the principal concerns that electric utilities have with the use of boxing and bracketing in the communication space is that such structures can, and often do, impede access to the electric space at the top of the pole, raising significant safety and operational concerns. This is

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3 *Order*, at ¶ 10

4 *Order*, at ¶13.

5 APPA is also supportive of a similar clarification sought in a petition filed by the Florida Investor Owned Utilities.

particularly true where utility crews climb the poles rather than use bucket trucks, as is often the case with smaller and more rural utilities. In contrast, the placement of cross arms and fiberglass brackets to support electric conductors at or near the tops of poles does not raise safety or operational issues because neither communications workers nor electric utility crews need to pass or get above the cross arms and fiberglass brackets.

In addition, as the Coalition notes, boxing a pole can impact the ease and manner in which pole replacements can be made. While facilities at the top of a pole can readily be moved to either side of the pole and not impede pole change outs, wires that box a pole in the communication space typically have insufficient slack to be moved over the top of the pole to the other side. Thus, when a pole is boxed in the communications space, the new pole must be inserted between the wires on both sides of the existing pole. Such a procedure is significantly more costly and time consuming, and it creates additional safety hazards and risks of damaging the communications facilities that are attached to the existing pole.

## III. THE COMMISSION SHOULD REJECT THE STATE CABLE ASSOCIATIONS' ATTEMPT TO REQUIRE POLE REPLACEMENTS IN CONTRAVENTION OF THE STATUTORY LANGUAGE OF SECTION 224

In its *Order* of May 20, 2010, the Commission held that requiring the use of bracketing or boxing, as described above, does not violate 47 U.S.C. Section 224(f)(2) of the Act, which allows electric utilities to deny access where there is "insufficient capacity," because the use of such techniques allows a utility to accommodate additional attachments on an existing pole. At the same time, the Commission explicitly "recognize[d] that the Eleventh Circuit held in *Southern Co. v. FCC*, that utilities are not obligated to provide access to a pole when it is agreed that the pole's capacity is insufficient to accommodate a proposed attachment."[6]

[6] *Order*, at ¶ 14.

Despite the clear finding by the Court in *Southern Company* that the Commission cannot compel a utility to replace an existing pole with a new pole in order to accommodate a new attachment, a group of State Cable Associations have requested that the Commission do precisely that. In support of their petition the Cable Associations argue, that it is common practice for utilities to replace existing poles where there is insufficient capacity to accommodate a new attachment, and that the Court in *Southern Company* only allows a utility to refuse to replace a pole in instances where both parties agree that there is insufficient capacity on the existing pole. The Cable Associations go on to suggest that a pole can only be found to have insufficient capacity where "*no* measures can be taken to allow attachment of further equipment without displacing any pole user" and "replacement with [a] taller pole is not feasible."[7]

The clams of the Cable Associations are nonsensical and based on tortured reasoning. First, the fact that it is common practice for utilities to replace existing poles with taller poles in order to accommodate new attachments is not evidence that federal law compels such action. Second, the practical effect of the Cable Associations' petition would be to enable attaching entities to require pole replacement in all cases unless a pole replacement is not possible. That, however, is simply not the statutory standard. As the Eleventh Circuit explained in *Southern Company* the Commission cannot compel a utility to replace an existing pole in order to accommodate an additional attachment that could not be made on the existing pole.

> While the FCC is correct that the principle of nondiscrimination is the primary purpose of the 1996 Telecommunications Act, we must construe statutes in such a way to "give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000). (internal quotation marks omitted). Section 224(f)(2) carves out a plain exception to the general rule that a utility must make its plant available to third-party attachers. When it is agreed that capacity is insufficient, there is no obligation to provide third parties with access to that particular "pole, duct, conduit, or right-of-way." 47 U.SC. § 224(f)(2). As Commissioner Michael Powell noted, it is hard to see

[7] State Cable Associations Petition, at p. 6.

> how this provision could have any independent meaning if utilities were required to expand capacity at the request of third parties. The entire purpose of the section is to specify the conditions under which the general rules mandating access for third parties do not apply. By attempting to extend those generally applicable rules into an area where the statutory text clearly directs that they not apply, the FCC is subverting the plain meaning of the Act.[8]

The Court's statement in *Southern Company* that a utility can refuse to replace a pole "when it is agreed that capacity is insufficient," refers to a situation where there is agreement that the existing pole cannot accommodate an additional attachment. Contrary to the Cable Associations' suggestion, the Court's statement does not refer to or require an agreement between the parties that replacing the pole with a taller pole is infeasible. As the Commission noted in its *Order*, by virtue of [the *Southern Company*] decision, "the statutory language of section 224(f)(2) *is* given effect, in that utilities may deny access for 'insufficient capacity' when 'it is agreed that capacity *on a given pole or other facility is insufficient*.'"[9] Thus, it relates to agreement between the parties with respect to the capacity of a particular existing pole, not agreement over the feasibility of installing a replacement pole.

Finally, *Alabama Power Co. v. FCC,* 311 F.3d 1357 (11th Cir. 2002), and *Florida Cable Telecomms. Ass'n v. Gulf Power Co.*, *ALJ Initial Decision*, 22 FCC Rcd. 1997 ¶ 11 (2007), do not support the Cable Associations' argument that the proper test for full capacity is whether it is possible to replace a pole. These cases both relate to pole attachment *rates* and address full capacity only in the context of just compensation for the taking of property. These cases provide no relevant discussion of whether or when a particular pole may have insufficient capacity to accommodate an additional attachment under Section 224(f)(2).

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8 *Southern Company*, at 1346-1347.

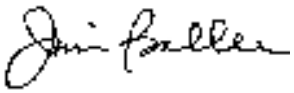
9 *Order*, at ¶ 15, quoting *Southern Company*, at 1346.

Accordingly, consistent with established law the Commission should not and indeed cannot require utilities to replace existing poles in order to accommodate a new attachment.

## IV. CONCLUSION

For all of the forgoing reasons, APPA urges the Commission to clarify the Order as proposed by the Coalition of Concerned Utilities and to deny the petition for reconsideration of the State Cable Associations.

Respectfully Submitted,



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